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No. _____ OFFICE OF THE CLERK

In the
Supreme Court of the United States

VALENTINA PEREZ,
Petitioner,

v.

NORWEGIAN-AMERICAN HOSPITAL, IVAN RIVERA, and STEVE DAHL,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Pro Se

QUESTIONS PRESENTED

1. Whether a single act of battery succeeded by repeated acts of public humiliation, threats, intimidation, demotion, and isolation constitute the perpetuation of a hostile workplace permeated with discriminatory intimidation, ridicule, and insult within the meaning set forth in *Harris v. Forklift Systems, Inc.* 510 U.S. 17, 114 S.Ct. 367 (1993).

2. Whether an adverse employment decision resulting in a demotion may be deemed causally linked to the reporting of sexually motivated battery that occurred six months prior to the demotion where the employer has committed several discrete and overt acts of discriminatory conduct toward the victim during the interim.

LIST OF PARTIES

All parties to this suit have been included in the caption above.

RULE 29.6 NOTATION

Pursuant to Supreme Court Rule 29.6, petitioner states that she is not a corporation, has no parent company, and no wholly or nonwholly owned subsidiaries

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1), is unreported. The opinion of the district court (App. A, *infra* 2), is unreported.

JURISDICTION

The court of appeals' judgment was entered on March 5, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part: "[T]he Laws of the United States ...shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI cl. 2. The relevant statutory provision is 42 U.S.C. § 2000e-5.

STATEMENT OF THE CASE

This case raises the very serious question of the lack of uniformity of the enforcement of the Title VII prohibition against discrimination and harassment based on gender. The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331, 1343, 1347, and 42 U.S.C. § 2000e-5. This Court established a standard for evaluating the severity and pervasiveness of discriminatory conduct in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993). The standard set forth in *Harris*, provides for evaluation of the

existence of a hostile work environment on a case-by-case basis. *Harris* holds that the language of Title VII:

> evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment. When the workplace is permeated with discriminatory intimidation, ridicule, and insult...that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, ...Title VII is violated."

Harris, 510 U.S. at 21. The court established that the existence of a hostile work environment may be determined by "the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris,* 510 U.S. at 21. Unfortunately, the standard has opened the door for loose interpretation, inequitable dispositions, and inconsistent rulings by district courts. In the Seventh Circuit, the Court of Appeals has ruled that statement and acts of "teasing", sexually suggestive comments, intimidating staring, and unwanted touching are insufficient to constitute severe and pervasive conduct while citing *Harris* as authority for this finding. *Adusumilli v. City of Chicago,* 164 F.3d 353, 362 (7th Cir. 1998). In view of the Court instituted determinants, the facts alleged in cases dismissed and disposed of upon summary judgment in the Seventh Circuit are incongruous with this Court's holding in *Harris.*

A. The Need to Establish Uniformity In the Application of the *Harris* Standard to Determine "Severe and Pervasive" Conduct.

Victims of sexual harassment and sex discrimination within the jurisdiction of the Seventh Circuit cannot rely on the protections of Title VII or the precepts established in *Harris*. Due to the conflicting manner in which district courts have applied the *Harris* factors, facts clearly supporting claims of severe and pervasive discriminatory conduct constituting hostile work environments are routinely disregarded and meritorious claims have been denied.

Both the *Adusmilli* and *Hilt-Dyson* courts made findings ostensibly applying the *Harris* principles. Neither of these rulings provided a solid basis to ascertain what depth of conduct is prohibited and what level of conduct is acceptable. In both cases, the court supplanted the objective and subjective effect on the respective plaintiffs and inextricably determined that the offenses could not have been as bad as claimed. Each court summarily came to its conclusion based on its subjective determination that the plaintiff did not suffer "great" impact as a result of the employer's conduct. *Adusumilli*, 164 F.3d at 361. The inconsistent findings issued by the courts are not supported by the facts in each case. Based upon the lack of uniformity of the application of *Harris*, the Seventh Circuit's rulings regarding the determination of hostile work environments are unjustly skewed.

B. The Seventh Circuit's Imposition of an Artificial Barrier to Recovery Premised on its Random Assignment of an Unduly Limited Temporal Proximity Requirement.

The lower court's ruling impairs the ability of a plaintiff to sustain a viable retaliation claim. Its reasoning is in opposition to the decisions of the Ninth Circuit Court of Appeals. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 1511 (2001). The Seventh Circuit gives no clear definition of when alleged acts of discrimination are

within temporal proximity of a protected activity. If the court's ruling is allowed to stand, it will effectively bar legitimate claims of retaliation. Review of this case is warranted in order to set a clear threshold in establishing a causal link between a protected activity and adverse employment action.

C. The Court of Appeal's Decision

The court below concluded that a slap on the buttocks is not objectively abusive. (App. A, *infra,* at p. 6). The court likened the unequivocal, forceful blow suffered by the Petitioner to the tentatively identified "poke" noted by the plaintiff in *Adusumilli*. The lower court further, found that the stalking by one of the defendants and taunts by Petitioner's coworkers were not related to her sex although there was no evidence refuting her assertions of her malefactors' stated intent. (App. A, *infra,* at p. 7). The court of appeals found that Petitioner's transfer to an unfavorable shift, subjection to the authority of her subordinates, and suffering of post traumatic stress syndrome did not constitute adverse employment actions. Finally, the court found that due to the six month interval between Petitioner's complaint of Defendants' battery of her and her ultimate transfer to the nightshift, the time was "too lengthy" to establish a causal connection. (App. A, *infra,* at p. 9).

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit Has Systematically Misapplied the Standard Set forth in *Harris* and Guidance from This Court is Needed to Reconcile the Definition of Harassment as Applied in *Adusumilli, Hilt-Dyson, Quantock, Hostetler*, and *Smith*.

The Seventh Circuit Court of Appeals acknowledged in *Hilt-Dyson* that no "bright line" exists differentiating

"innocuous from actionable behavior". *Hilt-Dyson v. City of Chicago,* 282 F.3d 456, 463 (7th Cir. 2002); *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 807 (7th Cir. 1997). In spite of the factors delineated by this Court, the district courts and the Seventh Circuit Court of Appeals has failed to render decisions in a consistent manner. This has resulted in discriminate and inconsistent rulings for different victims who have experienced substantially similar circumstances. Due to the lower courts' failure to establish a uniform basis upon which discrimination and harassment victims can rely, claimants are subject to a veritable crap-shoot when any given defendant submits a motion for summary judgment. In light of the courts' random and arbitrary method of applying the *Harris* factors, the courts need guidance to set forth more objective elements defining "severe and pervasive" conduct.

Adusumilli v. City of Chicago

The *Adusumilli* court examined evidence of offensive statements and touching and deemed them to be within the "safe harbor" of tepid, intermittent, and equivocal behavior. The court summarily came to this conclusion based on its subjective determination that the plaintiff in that case did not suffer "great" impact as a result of the employer's conduct. *Adusumilli*, 164 F.3d at 361.

Hilt-Dyson v. City of Chicago

In *Hilt-Dyson,* the court found that offensive touching and leering, to such an extent that the victim felt intimidated, did not constitute harassment within the meaning of Title VII. The *Hilt-Dyson* court has created a requirement that in order for an unwanted sexual touching to be objectively hostile or abusive, a "threat" or "intimidation" must accompany the conduct. The very nature of the touching itself begs the question of whether such contact would be threatening or intimidating to the recipient. Further, the court created a

factor not included in *Harris* in that if the malefactor ceases the offending conduct after having already committed the offending act, the egregious nature of the conduct is negated.

Quantock v. Shared Marketing Services, Inc.

Contrarily in *Quantock*, the Seventh Circuit held that the "outright solicitation of numerous sex acts" constitutes severe conduct, even though committed infrequently. *Quantock*, 312 F.3d at 904. The court found that the actor's "significant position of authority" was a deciding factor as to whether sexually explicit suggestions were objectively severe. The court further found that the plaintiff's reporting of the incident, receipt of psychological treatment, and feelings of humiliation can substantiate the severity of the defendant's conduct and the hostile nature of her work environment. *Quantock*, 312 F.3d at 904.

Hostetler v. Quality Dining, Inc.

The court found that the defendant's act of placing his tongue in the plaintiff's mouth and partially removing her bra constitutes humiliating and "possibly threatening" conduct. The court further found that the defendant's reference to a "hypothetical sexual act" with the plaintiff "could be interpreted as an (uninvited) sexual proposition."

Smith v. Sheahan

In *Smith* the court found that the plaintiff's violent physical abuse at the hand of her coworker constituted sexual harassment, rather than criminal battery, even though the contact was not sexual in and of itself. The Seventh Circuit found that the defendant's alleged propensity to target women, asserted via the affidavits of his other alleged victims, was sufficient to show his discriminatory intent. *Smith v. Sheahan*, 189 F.3d 529, 531 (7th Cir. 1999).

The court below, through its ruling in the instant case, has further diluted the demarcation line between the actionable and the permissible by creating additional proof requirements. Moreover, the lower court has unreasonably and unnecessarily declined to rule on the relationship to the *Harris* elements of the cumulative acts of battery, taunting, stalking, demotion, and disparate treatment resulting in severe psychological repercussions as they relate to a determination of severe and pervasive conduct. A ruling from this Court is necessary to solidify the types of acts that may be deemed actionable under *Harris* and the implications of cumulative offensive acts to the requisite factors imposed by this Court.

II. The Decision Below Perpetuates and Validates the District Courts' Misapplication of *Harris* and its Progeny to Suit the Personal Biases of Individual Judges Rather than the Carriage of Justice.

A. The Court Below Erred in Finding that Battery Consisting of Slapping and Conduct including "shunning" was not "severe and pervasive"

Although in *Quantock,* the court found the plaintiff's malefactor's position of authority sufficiently daunting so as to render his infrequent conduct "severe", the court of appeals in this case deemed insignificant one of Petitioner's malefactors close familial relationship and position of influence with a decision-maker with the authority to terminate her. The court further disregarded another malefactor's admission that the motive for his mistreatment of her was her complaint against the hospital administrator's son. The lower court omitted ruling on the implication of Petitioner's subjection to the authority of her subordinates and suffering of post-traumatic stress syndrome as they relate

to the determination as to the severity of the Defendants' actions and the permeation of a hostile work environment.

Further, the lower court declined to analyze the implication of the multiple adverse acts of Defendants as they relate to the factors established by this Court. The court must "look to "all the circumstances", including the frequency of discriminatory conduct and whether it is physically threatening or humiliating, in addition to whether or not it unreasonably interferes with an employee's work performance." *National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 116, 122 S.Ct. 2061, 2074 (2002). The cumulative effect of repeated conduct, a series of separate acts collectively constituting one act, evinces a hostile work environment. *National,* 536 U.S. at 117 (2002).

B. The Court Below Erred in Finding that the Employer's Conduct in Transferring Petitioner to a Less Favorable Shift, Repeatedly Charging Her With False Disciplinary Actions, and Compelling Her to Report to the Authority of Her Subordinates Occurred Too Long After Her Internal Complaint of Sexual Harassment to be Deemed Retaliatory

The Seventh Circuit Court's decision is contrary to this Court's ruling in *Clark County Sch. Dist. v. Breeden,* that a causal relationship between the protected activity and the adverse employment action suffered need not be proved by temporal proximity. *Clark,* 532 U.S. at 273. The Seventh Circuit has used the temporal proximity as a bar to allowing legitimate retaliation claims to proceed on the merits.

Under the direct method, in order to present a prima facie case of retaliation, a plaintiff must show: (1) that she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there is a causal relationship between the protected activity and the adverse employment

action suffered. *Ajayi v. Aramark Business Services Inc.*, 336 F. 3d 520, 533 (7th Cir. 2003).

The court below erred in concluding that Petitioner failed to establish a prima facie case of retaliation. (App. A, *infra*, at p. 9-10). The court's decision is based on the flawed premise that Petitioner needed to establish temporal proximity between her complaint of discrimination and Defendants' retaliatory acts. There is no dispute that Petitioner engaged in a protected activity when she made a formal complaint against Defendant Dahl. The Seventh Circuit effectively impeded Petitioner's claim in its finding that the six month lapse from the time she complained of Defendant Dahl and her subjection to a false reprimand and demotion was too lengthy to establish a causal connection. (App. A. *infra* at p. 9).

This Court has determined that "the cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be *very close*." *Clark,* 532 U.S. at 273 (emphasis added). This Court has not, however, given the circuits any guidance on what constitutes *close proximity*. In *Clark,* this Court noted that an action taken 20 months later is insufficient to establish causality. *Clark,* 532 U.S. at 274.

The Seventh Circuit has held that "to establish a causal connection via mere temporal proximity, the employer's adverse action must follow fairly soon after the employee's protected conduct." *Hoffman-Dombrowski v. Arlington Intern. Racecourse,* 254 F.3d 644, 653 –54 (7th Cir. 2001) (finding that employee's termination 13 months later was not causally connected to her retaliation claim); citing *Fyfe v. City of Fort Wayne,* 241 F.3d 597, 603 (7th Cir. 2001). In the case at bar, the Seventh Circuit appellate court

determined that a six month lapse between the protected activity and the reprimand and transfer was too long to establish a causal connection. (App. A, *infra,* at p. 9). The court's reliance on *Franzoni v. Hartmarx Corp.*, 300 F.3d 767, 773 (7th Cir. 2002) is misapplied.

In *Franzoni,* the Seventh Circuit found that adverse employment action that occurred six months after the protected expression is too lengthy to sustain a retaliation claim in the absence additional evidence. *Franzoni*, 300 F.3d at 772-773. The lower court's conclusion that Petitioner's claim must fail because she cannot show temporal proximity is flawed. Petitioner, unlike the employee in *Franzoni,* presented additional evidence to substantiate her claim of retaliation. *Franzoni*, 300 F.3d at 772-773. Petitioner did not rest her claim solely on the temporal proximity of the defendant retaliatory actions and her sexual harassment complaint.

"Temporal proximity is only evidence of causation not a separate element of the prima facie case." *Haywood v. Lucent Technologies, Inc.* 323 F.3d 524, 533 (7th Cir. 2003). The lower court's analysis in determining a causal link between Petitioner's complaint and her demotion is too narrowly defined. Evidence of temporal proximity coupled with additional evidence, where the proximity is not unduly suggestive, will effectively establish a prima facie case of retaliation. *Farrell v. Planters Lifesavers Co.,* 206 F.3d 271, 280 (3rd Dist. 2000). The lower court's decision improperly limits meritorious claims.

In the Ninth Circuit, the appellate court found that a causal connection can be inferred by producing evidence of the temporal proximity of the adverse action to the statutorily protected activity." *Barnett v. U.S. Air, Inc.,* 157 F.3d 744, 747, 754 (9th Cir. 1998). In *Barnett,* the court found a causal connection between the employee's request for

accommodations and the employer's placement of the employee on the job injury list five months later. *Id.* Likewise, even under the lower court's finding, six months is not too lengthy a period to establish a causal link.

The retaliation against Petitioner did not begin with her demotion, but with (1) Defendant Rivera's and Petitioner's subordinates and co-workers shunning her, isolating her, and taunting her with rumors that she would be demoted; (2) Defendant Dahl repeatedly following her into areas he was not stationed to work, for the express purpose of frightening her; (3) Defendant Rivera drafting allegations of policy violations against her which he knew to be false; and (4) Defendant Rivera's demoting her six month subsequent to her internal complaint. *Passantino v. Johnson & Johnson Consumer Products,* 212 F.3d 493, 502, 507 (9th Cir. 2000) (holding that removing employee's job responsibilities; transferring her accounts to other employees without notice; excluding her from manager's meetings; reducing her performance objectives; changing her job title; and taking other actions to demean her job participation are sufficient acts to establish retaliation.) Workplace conduct is not measured in isolation, but must be evaluated by looking at the totality of the circumstances. *Clark,* 532 U.S. at 271, citing, *Faragher v. Boca Raton,* 542 U.S. 77, 787-88, 118 S.Ct. 2275, 2283 (1998).

The Court's failure to indicate the prohibition or permissibility of committing multiple adverse acts over an extended period of time and failure to rule on the implication of repeated discriminatory acts following an initial harassing act and complaint thereof has resulted in confusion of the prevailing law in the Seventh Circuit and represents a misrepresentation of this Court's holding in *Harris.* Further, the Seventh Circuit has created a factor that replaces causality with temporal proximity as a necessary element of a retaliation claim. *Farrell,* 206 F.3d at 281. If left to stand,

the lower court's ruling will serve to unduly complicate the application of the *Harris* factors to future cases. Finally, the lower court's ruling distorts the *Harris* holding, adds an additional and unduly oppressive element to retaliation claims, and will result in the denial of countless meritorious claims that should properly be presented to a trier of fact for disposition.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: June 3, 2004

Respectfully
Submitted,

/s/ Valentina Perez
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APPENDIX

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A. Opinion of the U.S. Court of Appeals for the Seventh Circuit.....1

B. Opinion of the U.S. District Court for the Northern District of Illinois, Eastern Division.....1